

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 17, 2008 Session

MARILYN RUSSELL-JOHNSON v. THERON L. JOHNSON

**Direct Appeal from the Circuit Court for Hamilton County
No. 06-D-2180 Hon. L. Marie Williams, Circuit Judge**

No. E2007-02913-COA-R3-CV - FILED AUGUST 14, 2008

Plaintiff's action to declare a common law marriage to defendant was rejected by the Trial Court. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Appeal Dismissed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Marilyn Russell Johnson, Chattanooga, Tennessee, *pro se*.

Daniel K. Habenicht, Chattanooga, Tennessee, for appellee, Theron L. Johnson.

OPINION

Plaintiff/Appellant, brought this action to establish a common law marriage between the parties either under Georgia law or, alternatively, Alabama law.

Plaintiff/Appellant represented herself *pro se* at all stages of this case, and the technical record is deficient in some respects. There is neither a transcript of evidence nor a statement of evidence in the record.

The trial on whether the parties were married was held on April 3, 2007.¹ The Trial Court's Order entered on July 11, 2007 revealed that the Trial Court examined the facts presented in the context of the elements of a common law marriage under both Georgia and Alabama law and dismissed the suit based on a finding that plaintiff did not carry her burden of proof on the establishment of a common law marriage.² The only findings of fact included in the Order are that defendant never intended to contract to enter a marriage with appellant and that the cohabitation between the parties was intermittent at best. The Court concluded that there was "significant evidence in the record which casts great doubt on the credibility of the existence of a common law marriage in this case." This Order contained the Clerk's Certificate dated July 11, 2007 which states that a copy of the Order was served on all parties or counsel for all parties in this cause.

Appellant filed a "Motion to Alter or Amend Order" Signed July 11, 2007 Pursuant to Federal Civil Procedure Rule 60 (a)(b)(1)(6). The Motion asked the Court to alter or amend its order of July 11, 2007 to include the "exact significant evidence" the Court based its decision on that defendant never intended to contract to enter into a marriage and that cast doubt on the credibility of the existence of a common law marriage. The Motion further averred that appellant did not receive a copy of the July 11, 2007 Order until September 5, 2007. Defendant moved to strike the Motion. The Trial Judge heard appellant's Motion to Alter or Amend on September 17, 2007 and entered an Order denying the Motion on October 23, 2007.

Appellant has appealed to this Court and we conclude that while the issue raised by her is convoluted and confusing, she essentially argues that the Trial Court erred when it denied the Motion to Alter or Amend the Judgment. Defendant also appealed and asked the Court to award attorney's fees because the appeal was frivolous.

The standard of review for an appeal of a trial court's denial of a Rule 59.04 motion (we are treating the Motion as a Rule 59 Motion) is the abuse of discretion standard. The Tennessee Supreme Court explained the abuse of discretion standard. In *Eldridge v. Eldridge*, 42 S.W. 3d 82

¹ It is well settled that although Tennessee does not recognize as valid a common law marriage contracted within this state, our courts do recognize as valid a common law marriage contracted in a state where such a marriage is valid. *Shelby County v. Williams*, 510 S.W.2d 73, 73-74 (Tenn. 1974)(citing *Troxel v. Jones*, 45 Tenn. App. 264, 322 S.W.2d 251(1958); *Lightsey v. Lightsey*, 56 Tenn. App. 394, 407 S.W.2d 684 (1966); *Smith et al. v. Mitchell et al.*, 185 Tenn. 57, 202 S.W.2d 979 (1947)).

² Under both Georgia and Alabama law, the party asserting a common law marriage bears the burden of proving its existence. *Dixon v. State*, 217 Ga. App. 267, 268, 456 S.E.2d 758, 760 (Ga. App.1995)(citing *Dismuke v. C & S Trust Co.*, 261 Ga. 525(1), 407 S.E.2d 739; *Foster v. Foster*, 178 Ga. 791(3), 174 S. E. 532; *Edwards v. Edwards*, 136 Ga. App. 668, 669, 222 S.E.2d 169). *Smith v. Smith* 247 Ala. 213, 23 So.2d 605 (Ala.1945)

(Tenn. 2001): “Under the abuse of discretion standard, a trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining.” *Eldridge* at 85. The application of the abuse of discretion standard does not allow the appellate court to substitute its judgment for that of the trial court.

It is well established that Tennessee courts are to provide “fair and equal treatment” to parties who decide to represent themselves. *Hessmer v. Miranda*, 138 S. W. 3d 241, 244 (Tenn. Ct. App. 2003). Accordingly, we are to permit the self-represented litigant who has no legal training some leeway in drafting their pleadings, motions, and other papers and judge the writings with less stringent standards than those applied to papers prepared by members of the bar. *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003). However, we are aware of the boundary between fairness to a *pro se* litigant and unfairness to the *pro se* litigant's adversary. Thus, courts must not excuse *pro se* litigants from complying with the same substantive and procedural rules that represented parties are expected to observe. *Whalum v. Marshall*, 224 S.W.3d 169, 179 (Tenn. Ct. App. 2006). The self-represented litigants “must act within the time periods provided by the applicable statutes and rules in order to have their cases considered”, *Grigsby v. Univ. of Tenn. Med. Ctr.*, No. E2005-01099-COA-R3-CV, 2006 WL 408053 at *3 (Tenn. Ct. App. Feb. 22, 2006). Moreover, *pro se* litigants cannot shift the burden of the litigation to the courts or to their adversaries, and courts cannot create claims or defenses for *pro se* litigants where none exist. *Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tenn. Ct. App. 1994). According the appellant the benefit of Tenn. R. Civ. P. Rule 59, under Rule 59.04 a Motion to Alter or Amend a Judgment is timely if it is "filed and served within thirty (30) days after the entry of Judgment". Tenn. R. Civ. P. 59.02 and 59.04. Appellant's Motion was not filed until September 7, 2007, beyond the time allowed by the Rule. As the Motion was filed beyond the thirty day period permitted by Tenn. R. Civ. P. 59, the Trial Court was without jurisdiction to consider the motion if it was indeed a motion to alter or amend the final judgment. It follows that if the Trial Court did not have jurisdiction to consider the motion, its denial of the motion is void and non-appealable by this Court.

Assuming, arguendo, that the post-trial Motion filed by the appellant could be construed as a Tenn. R. Civ. P. Rule 60.02(1) as a Motion for relief from the Final Judgment of July 11, 2007, she filed a Notice of Appeal before the Trial Court entered Judgment on the Motion, thereby rendering the Trial Court without jurisdiction to rule on the Motion.

The Tennessee Supreme Court in *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586 (Tenn. 1994) held that a trial court does not have jurisdiction to consider a Rule 60 motion after a notice of appeal has been filed. *Spence* at 596. Absent an application for remand, the Trial Court's attempt to enter further orders addressing the party's Rule 60.02 Motion is a nullity. *Born Again Church & Christian Outreach Ministries, Inc., v. Myler Church Bldg. Systems of the Midsouth, Inc.*, No. M2006-02701-COA-R3-CV, 2007 WL 4404096 at *2 (Tenn. Ct. App. Dec. 17, 2007).

Accordingly, we vacate the Trial Court's Order of October 23, 2007 and dismiss this appeal.

Appellee seeks an award of attorney's fees associated with this appeal. However, under the circumstances of this case, in our discretion, we deny appellee's Motion for attorney's fees.

The cost of the appeal is assessed to Marilyn Russell-Johnson.

HERSCHEL PICKENS FRANKS, P.J.